Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1994

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,
Petitioner,

v.

GEORGE W. HENGLEIN, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where operative acts and events occurring before ERISA's effective date evidenced extinguishment or nonexistence of any circumstances that could have given rise to the existence of an employee benefit plan as defined by ERISA, whether the Third Circuit's mandate directing that ERISA be applied to those pre-ERISA acts and events so as to establish both an ERISA plan and federal jurisdiction contravenes the Congressional limitation on federal jurisdiction set forth in ERISA § 514(b)(1), which requires that ERISA "shall not apply with respect to any . . . act or omission which occurred before January 1, 1975?"

LIST OF PARTIES

Petitioner (Defendant/Appellee below) is a putative employee benefit plan. The putative Petitioner plan is: Colt Industries Operating Corporation Informal Plan For Plant Shutdown Benefits For Salaried Employees.

Respondents (Plaintiffs/Appellants below) are one hundred and sixty-three individuals: George W. HENGLEIN, L.C. Albacker, R.B. Andrews, R.L. Appeldorn, R.H. Ashenbaugh, A.L. Austin, J.W. Bagosi, J.D. Balser, A. Barrasso, J.O. Bauer, E.E. Best, H.W. Bigleman, C.R. Blazier, J.P. Bressanelli, G.D. Brown, F.C. Buchholz, E.C. Calvin, R.R. Campbell, P.D. Castellano, J.L. Cerasi, E. Chapman, S. Christy, T.M. Costello, C.A. Dauka, A.J. Decosta, M.G. Degrande, A.S. Diccio, A.P. Dimarzio, C.J. Dimarzio, R.J. Dougherty, M. Druga, E.P. Erath, E.P. Fahnert, H. Farrington, M. Ferlaino, R.D. Feydo, E.R. Finger, J.N. Flara, N.E. Frederick, J.P. Frenn, R.E. Fronko, L.L. Gibbs, W.L. Gleason, L.E. Gordon, R.W. Gott, J.E. Grimm, P.E. Grubbs, E.R. Guerra, A.J. Gulutz, J.T. Haaf, J.D. Hamacher, Jr., P.J. Hannon, R.M. Hansen, M.I. Harpham, D.H. Heldman, J.K. Hile, R.S. Hogsett, R.T. Hopper, H.M. Howell, W.M. Hyams, J.M. Janke, C.L. Jobe, Jr., K.H. Johns, R.O. Johnson, Jr., E.T. Jones, R. Kao, D.P. Kerr, Jr., P.A. Keys, R.W. Knallay, E.E. Knapek, W.J. Kofalt, S.W. Kohler, T. Kominitsky, T.R. Krupa, P.R. Kullen, J.R. Kundick, W. Lake, D.F. Laneve, T.T. Lehmann, R.H. Lewis, R.A. Lippert, W.R. Livingston, J.H. Lutton, A.J. Lynn, D.B. McClain, J.L. McKain, P.F. McNicol, E.L. Marsh, F.S. Matsukas, H.J. Mercer, A.R. Middleton, M. Mitrovich, M.A. Molchan, R.A. Montgomery, R.T. Morelli, A.N. Morrison, H. Mraunac, M.R. Muckian, C.W. Murray, III, C.J. Muers, L.V. Nagle, D.A. Nobers, J.A. Nuzzo, E. Ordich, W.H. Orr, T.H. Parsons, A.J. Pasko, Jr., H.S. Pease, III, G.J. Pescion, G.V. Peterson, J.J. Popp, G.P. Porto, G. Postich, D.E. Powell, R.W.

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LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The stock of Coltec Industries Inc has been publicly traded since March 25, 1992. Garlock Inc is a wholly owned subsidiary of Coltec Industries Inc. Garlock Inc has four subsidiaries that are not wholly owned: Garlock Bearings Inc, Garlock de Mexico, S.A., Louis Mulas Sucs., S.A., and Garlock Pty. Ltd. Minority interests in each of these four subsidiaries are privately held by foreign investors.

Coltec Industries Inc is the successor of Colt Industries Inc. Prior to December 31, 1982, Crucible Inc was a wholly owned subsidiary of Colt Industries Inc. Certain former operations of Crucible Inc are now held by Crucible Materials Corp, a nonpublic company that is not affiliated with Coltec Industries Inc.

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COLT INDUSTRIES OPERATING CORPORATION
INFORMAL PLAN FOR PLANT SHUTDOWN
BENEFITS FOR SALARIED EMPLOYEES,

Petitioner,

v.

GEORGE W. HENGLEIN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE OPINION BELOW

This petition for writ of *certiorari* is from a judgment of the Court of Appeals for the Third Circuit, entered September 26, 1994, in *Henglein v. Colt Industries Operation Corporation Informal Plan*, reprinted in Petitioner's Appendix at 2 [hereinafter "App."], *reh'g denied*, November 4, 1994. [App. at 1.] The Third Circuit judgment was entered in an appeal of an unreported order of the United States District Court for the Western District of Pennsylvania. [App. at 22.]

STATEMENT OF JURISDICTION

The Court has jurisdiction to review the Third Circuit's order by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1). The district court below was alleged to have jurisdiction pursuant to §§ 502(a)(1)(B) and (e)(l) of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 891 (codified at 29 U.S.C.§ 1132(a)(1)(B) and (e)(1) [hereinafter "ERISA"]. *Certiorari* is appropriate because this case raises a critical issue concerning the authority of a federal court to establish the subject matter of jurisdiction through retroactive application of the provisions of ERISA to events and acts finally concluded, under the then applicable state law, prior to the enactment of ERISA on September 2, 1994, and because the actions as described and mandated by the Third Circuit place it in conflict with all other circuits, decisions of its own circuit, the Constitution of the United States and authorization of Congress contained in ERISA as to the jurisdiction of the federal courts.

RELEVANT STATUTORY AUTHORITIES

ERISA Section 3(2)(A) (Definitions):

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

ERISA Section 502(a)(1)(B) (Civil Enforcement):

(a) *Persons empowered to bring a civil action*

A civil action may be brought--

(1) by a participant or beneficiary--

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan [.]

ERISA Section 502(e)(1) (Civil Enforcement):

(e) *Jurisdiction*

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

ERISA Section 514(a) and (b)(1) (Other Laws):

(a) *Supersedure; effective date*

Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(b) *Construction and application*

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

STATEMENT OF THE CASE

Background

The individual plaintiffs are former salaried, non-union employees ("Plaintiffs") whose employment was terminated, in most cases, as a result of the closing by Crucible Inc ("Crucible") of part of its steel producing operations, namely those located at Midland, Pennsylvania ("Midland Plant"), in 1982. Plaintiffs claim that in 1982 (and today), an employee benefit plan in the nature of a supplemental "informal" pension plan existed that provides plant "shutdown" benefits to all salaried employees of Crucible and its successors affected by a shutdown.[1] The central issue is whether the Plaintiffs have proved that an employee benefit plan, within the meaning of ERISA § (3)(2)(A), existed in 1982 when Plaintiffs' employment terminated, thereby providing the district court with jurisdiction to proceed and adjudicate Plaintiffs' claims in this action.[2]

Following the closing of the Midland Plant, a majority of the present Plaintiffs filed a lawsuit in assumpsit in the Court of Common Pleas of Allegheny County, Pennsylvania, against Crucible and its sole shareholder, Colt Industries Inc ("Colt"), claiming that Crucible and Colt breached alleged contractual obligations to pay severance benefits in the form of a supplemental pension. *Schake v. Colt Indus. Inc.*, No. 83-14048 (C.P. Allegheny County). The alleged supplemental pension was based on an employment policy originated by Crucible in 1962 and revised in 1968 and 1969, which according to the complaint gave rise to an express and/or implied contract to provide the benefits spelled out in those policies. The claims also relied upon state law theories of estoppel and detrimental reliance.

The *Schake* complaint also contained a claim for additional benefits allegedly due under the provision of an employee benefit plan

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[1] Such a finding would impose on Plaintiffs' former employer an unaccepted obligation to provide benefits not only to the Plaintiffs, but to all salaried employees regardless of where physically employed. Unlike individual contracts, employee benefit plans today are required to cover large classes of employees.

[2] Citations are to the relevant sections of ERISA. The Table of Authorities contains parallel citations to the United States Code.

covered by ERISA that allegedly was created as a result of alleged oral statements by Crucible's management to the effect that salaried employee benefits would be "as good as" those provided to those employees within the collective bargaining unit at the Midland Plant.

On October 6, 1983, Colt and Crucible removed the state court action to federal court. Plaintiffs filed a motion to remand, which was denied. Thereafter, in 1985, the district court entered summary judgment in favor of both Crucible, plaintiffs' former employer, and Colt, Crucible's parent. The district court held that the plaintiffs only had benefit rights under the published formal pension plan for salaried employees of Crucible,[3] all previous plans having been eliminated prior to plaintiffs having fulfilled the eligibility conditions thereunder. In essence, the district court held that in 1972, when Crucible's Board of Directors took action to rescind the policy set forth in the 1962 statement, as modified in 1968 and 1969, no employee had any rights under the policy that could be exercised immediately or within a reasonable time of the Board of Directors' action. Therefore, no rights were impaired or denied by the Board of Directors' action rescinding the policy, and the elimination of the policy was effective.

Plaintiffs appealed the district court's entry of summary judgment. On appeal, plaintiffs ceased to argue the state law contract claims and instead argued that the 1962, 1968 and 1969 policy statements created an employee benefit plan within the meaning of ERISA under which plaintiffs were claiming benefits. Plaintiffs urged the court to apply state law contract and estoppel principles under the guise of federal common law of ERISA and to hold that under the state law of unilateral contract (adopted as federal common law) an "offer" existed to provide the benefits claimed by plaintiffs, which "offer" thereafter became an employee benefit plan after the effective date of ERISA. [*See* App. at 517.] According to plaintiffs, the district court had entered summary judgment improperly because there existed a genuine dispute of material fact as to the existence of an ERISA plan.

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[3] There is no dispute today, nor was there ever any dispute, as to the existence of the formal pension plan.

Crucible and Colt denied both the existence of any unilateral offer or contract and the existence of a benefit plan in 1982. In support, Crucible and Colt pointed to the resolution of Crucible's Board of Directors in 1972 eliminating the policy set forth in the 1962 statement, as modified in 1968 and 1969.

On appeal, the Third Circuit first held that because plaintiffs alleged they were entitled to benefits under an ERISA plan, the district court had subject matter jurisdiction. *Schake v. Colt Indus. Inc.*, 791 F.2d 920 (3d Cir. 1986) (table; text of opinion unpublished). [*See* App. at 517.] The Third Circuit indicated that the existence of an employee benefit plan is an essential element of a claim for benefits under ERISA. Since no ERISA plan was named as a defendant, however, the Third Circuit held that the action should be dismissed, rather than granting summary judgment, stating in footnote 2 of its opinion:

> We need not engage in the abstruse dialogue over whether our dismissal is for want of subject matter jurisdiction, Fed. Rul. Civ. Proc. 12(b)(1) or failure to state a claim upon which relief can be claimed, Fed. Rul. Civ. Proc. 12(b)(6) for the result is the same under our analysis.[4]

Following the mandated dismissal in *Schake*, Plaintiffs commenced the instant action, bringing suit against the purported benefit plans that the plaintiffs in *Schake* claimed arose by reason of state law unilateral contract and estoppel principles. Plaintiffs designated as putative defendants the Colt Industries Operating Corporation. Informal Plan for Plan Shutdown Benefits for Salaried Employees (the "Informal Plan") and the Colt Industries Operating Corporation Plan for Maintaining Benefits for Salaried Employees in Parity with Benefits Granted to Union Represented

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[4] The reason for the entry of summary judgment by the district court was not because the proper party was not named, but because the proper party against which to assert a claim for benefits (*i.e.*,an ERISA plan) did not *exist*. The "abstruse" distinction between Fed. Rul. Civ. Proc. 12(b)(1) and 12(b)(6) was not irrelevant to the district court's holding.

Employees (the "Parity Plan"). *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 86-2021 (W.D. Pa.) (*"Henglein"*).

The sole basis for Plaintiffs' claim that the Informal Plan existed is that under state law before the effective date of ERISA, Crucible was estopped to deny the existence of the alleged class offer, alleged to have been contained in the 1962, 1968 and 1969 policy documents, and therefore, an ERISA plan was created as a matter of law upon ERISA's effective date, January 1, 1975. Plaintiffs further claimed that the action taken by the Board of Directors of Crucible in 1972 terminating the alleged "offer" was ineffective because Plaintiffs were not notified.

The basis for Plaintiff's Parity Plan claim is reliance, *i.e.*, the employer repeatedly told employees promoted from the union ranks (a relatively small percentage of the total salaried work force) that their benefits would be "as good as" the benefits provided to union employees.

Plaintiffs also based their claims on an internal published corporate policy statement of Colt (not Crucible, the employer) to all of its subsidiaries, which indicated that Colt would maintain a good level of employee benefits consistent with general industry-wide practices, company means and sound business judgments. [*See* App. at 146.]

Coltec Industries Inc ("Coltec"), as putative "administrator" of the alleged Informal Plan and Parity Plan, moved to stay *Henglein* and concurrently filed an action for declaratory judgment seeking a declaration that neither of these alleged employee benefit plans existed. *Colt Indus. Inc. v. Frenn*, No. 86-2642 (W.D. Pa.) (*"Frenn"*). The district court stayed *Henglein* and proceeded to adjudicate the declaratory judgment issues in *Frenn*.

In *Frenn*, the district court granted summary judgment declaring that the Parity Plan did not exist as a matter of law. *Colt Indus. Inc. v. Frenn*, No. 86-2642 (W.D. Pa. Nov. 30, 1988) [App. at 515-16.] The district court reasoned that the alleged statements such as "as good as" or "just as if you had a union contract" are not evidence of an employee benefit plan under ERISA. *Frenn* at 21-22.[5] [App. at 531-32.] The

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[5] "Star-paging" is used in the appendix to indicate pagination of source documents.

district court based its reasoning upon the holding of the Eighth Circuit in *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987), that even under ERISA, "there must be a specific, if not written, expression of the employer's intent to be bound." *Frenn* at 21. [App. at 532.] The *Frenn* defendants did not appeal the holding that the Parity Plan did not exist. [*See* App. at 500.]

As to the Informal Plan, the district court in *Frenn* refused to grant declaratory relief, indicating that a genuine issue of material fact existed as to whether the Informal Plan existed in 1982. *Frenn* at 26. [App. at 535.] The court held that the defendants (Plaintiffs here) might be able to establish the existence of an ERISA plan through evidence that an obligation (promise) of Crucible existed at the time ERISA became effective, and that Crucible intended to continue such promise after ERISA became effective in the form of an employee benefit plan. *Frenn* at 19-20. [App. at 530-31.]

In light of its holding in *Frenn* with regard to the Informal Plan, the district court lifted the stay in *Henglein* and proceeded to take evidence as to the existence of the Informal Plan. The district court dismissed Counts II and III of the *Henglein* complaint, which alleged claims under the Parity Plan and claims for punitive damages and fraud. *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 86-2021 (W.D. Pa. May 25, 1989). [App. at 511-12.]

The district court heard 11 days of testimony. At the conclusion of Plaintiffs' case, Petitioner moved for involuntary dismissal under Federal Rules of Civil Procedure Rule ("Rule") 41(b) (now Rule 52(c)). The district court ordered dismissal, holding (as it did in *Schake*) that no Informal Plan existed in 1982. *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 86-2021 (W.D. Pa. April 30, 1991) ("*Henglein 1*"). [App. at 510.]

The district court reasoned that in order to prove an ERISA plan existed in 1982, Plaintiffs would have to prove that a valid state law offer for benefits existed at the time ERISA became effective. *Henglein 1* at 4. [App. at 507.] Citing *Morosetti v. Louisiana Land and Exploration Co.*, 564 A.2d 151 (Pa. 1989), the district

court held that the 1969 version of the policy document allegedly comprising the Informal Plan had no legal effect or significance under the laws of Pennsylvania. *Id.* [App. at 507-8.] According to the district court, Plaintiffs lacked sufficient knowledge as a whole concerning the terms of the alleged "offer" embodied in the 1969 version of the policy. *Id.* [App. at 507.][6] The district court also held that the absolute discretion retained by the employer in the application procedures of those documents[7] whether or not to offer and establish a contract rendered any alleged offer or promise illusory. *Henglein 1* at 4-5. [App. at 507-08.] Finally, the district court held that the Informal Plan cannot be forced upon the employer after the passage of ERISA based upon any form of the parity argument, since the Parity Plan claims had been dismissed. *Henglein 1* at 7-8. [App. at 510.]

For completeness, the district court also held, based on the reasoning of the Eleventh Circuit opinion in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), that the Informal Plan did not exist after the effective date of ERISA. *Henglein 1* at 5-6. [App. at 508-09.] The district court reasoned that the same unlimited discretion retained by the employer in the 1969 version of the policy, that was essentially the same as prior versions of the document, which barred the creation of an offer before ERISA, also barred showing the existence of an "employee benefit plan" after the effective date of ERISA. *Id.* The district court held that under *Dillingham*, a reasonable person could not identify the intended beneficiaries or eligibility criteria. *Id.* at 6. [App. at 509.] The district court further reasoned that the intent of the employer was expressed in writing in the form of the 1972 Crucible Board of Directors resolution terminating the policy as set forth in the 1962, 1968 and 1969 documents. *Id.* Citing *Frank v. Colt Indus. Inc.*, 910 F.2d 90 (3d Cir. 1990), the district court held that Crucible's actions, being in writing and specifically referring to the policy, fulfilled the requirements for an effective termination of an "employee benefit plan." *Id.*

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[6] The district court held that knowledge of the terms of the offer are essential to establish a basis of estoppel, indeed, the existence of a valid offer.

[7] *See* App. at 118-22, 126-29, 132-35.

In granting the Rule 41(b) motion, however, the district court concluded that it never had jurisdiction to hear the case and suggested that Plaintiffs file a state court action. *Henglein 1* at 8. [App. at 510.]

On cross appeals, the Third Circuit affirmed the district court's dismissal of Counts II and III of Plaintiffs' complaint (Parity Plan and punitive damages), but vacated the district court's order as to the nonexistence in 1982 of the Informal Plan. *Henglein v. Informal Plan for Plant Shutdown Benefits,* 974 F.2d 391, 402 (3d Cir. 1992) ("*Henglein I*") [App. at 483, 500.] The Third Circuit reversed the district court's conclusion that it never had subject matter jurisdiction to hear the case. *Henglein I* at 395, 397-398. [App. at 487, 491-93.]

In vacating the district court's holding that the Informal Plan did not exist, the Third Circuit purported to adopt the principles of *Dillingham*, but stated that the district court construed the *Dillingham* test too narrowly. *Henglein I* at 401. [App. at 498.] The Third Circuit stated that in making a determination whether an ERISA plan exists, *Dillingham* requires a court to look at all statements, documents, actions, etc., of the employer occurring over the working life of the employee -- both before and after the ERISA's effective date. *Henglein I* at 399-401. [App. at 496-98.] The test, according to the Third Circuit, is what the employees believed and what they knew of related "plan" documents, such as union plans. *Henglein I* at 400. [App. at 498.] Under the Third Circuit's application of *Dillingham*, oral representations made by a knowledgeable and authorized management employee of the company may be evidence of an employee benefit plan, especially if a representation incorporates by reference the terms of a document or other plan, so long as the oral statements do not contradict the terms of a written plan. *Id.* [App. at 498.] Thus, according to the Third Circuit, under ERISA an employee benefit plan in effect may be established and be held to be maintained solely based upon an employee's claim of reliance.

Finally, the Third Circuit stated that the district court improperly emphasized the employees' lack of knowledge of the terms of the 1968 and 1969 programs. The Third Circuit stated that

"ERISA does not require that a beneficiary have any knowledge of a written plan's terms and our jurisprudence has not imposed that requirement either," *citing Brown v. Ampco-Pittsburgh*, 876 F.2d 546 (6th Cir. 1989). *Henglein I* at 401. [App. at 499.] Thus, according to the Third Circuit, when the existence of an employee benefit plan is challenged, the plaintiff need only allege that the employer at some time made a representation regarding the provision of an employee benefit to show that an employee benefit plan exists.

Having set forth the type of evidence Plaintiffs would have to present to establish the representations and the existence of an ERISA plan, the Third Circuit remanded the case with an invitation for Plaintiffs to put in more evidence. *Henglein I* at 402. [App. at 500.] Plaintiffs elected not to submit additional evidence. [App. at 57.] Petitioner renewed its motion under Rule 52(c) (Motion for Judgment on Partial Findings). The district court granted the motion and entered judgment on behalf of Petitioner. *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No 86-2021 (W.D. Pa. April 30, 1993) ("Henglein 2"). [App. at 42-45.] In extensive findings of fact and conclusions of law, the district court reviewed the testimony of each participant who testified. This review was based upon all testimony whether admissible or not. *See Henglein 2* at 77-84. [*See* App. at 110-16.]

The district court set out three simple elements for Plaintiffs to meet their claims: (1) there must be an employee benefit plan and its terms must be discernable; (2) Plaintiffs must demonstrate that they are participants or employees who had rights to be participants; and (3) that Plaintiffs, as participants, had rights to benefits. *Henglein 2* at 2. [App. at 53.]

The district court began its analysis of these elements with the fact that Plaintiffs attached the 1962, 1968 and 1969 documents to their complaint and claimed that these documents formed the plan that was the foundation of their claim, *i.e.* the Informal Plan. *Henglein 2* at 10-11. [App. at 59-60.] Based on the evidence, the district court concluded that prior to the action of the Board of

Directors in 1972 terminating the policy embodied in these documents, the policy was operated strictly in accordance with the discretionary selection and approval procedures set forth in the documents[8]. *Henglein 2* at 15. [App. at 63.] Thus, there was no outstanding offer, no promise and no rights in any existing employee to receive benefits under the terms of those documents. *Henglein 2* at 14. [App. at 62-63.] The district court held the action of the Board of Directors to be a valid corporate act cutting off any future power in the corporation to create future obligations under the rescinded policy. *Henglein 2* at 12. [App. at 61.] The district court thus held that absent the employer being estopped from asserting the fact of the termination, the termination was absolute, complete and effective. *Id.*

Focusing on the wording of the *Henglein I* remand and specifically the Third Circuit's mandate, the district court viewed the issue as "whether the Informal Plan continued in effect after it was rescinded by Crucible's Board of Directors." *Henglein 2* at 22. [App. at 69.] Consistent with this statement, the district court applied the Pennsylvania law of contracts to events that occurred before ERISA's effective date. *Henglein 2* at 45. [App. at 85.] The district court noted that with the holding as to the Parity Plan, the reliance evidence that purported to establish a mandatory correlation between the benefits negotiated by the union and those established by the employer for its non-bargaining unit salaried employees was irrelevant for the purposes of establishing the existence of the Informal Plan. *Henglein 2* at 22-27. [App. at 68-72.]

Based on its findings of fact and conclusions of law, the district court held that no promise or offer existed when ERISA became effective to which ERISA could be applied. *Henglein 2* at 55. [App. at 92-93.] The court reviewed Plaintiffs' evidence regarding events occurring after ERISA's effective date and concluded this evidence did not meet any of the criteria spelled out in *Dillingham*. *Henglein 2* at 32. [App. at 76.] The district court found as a matter of law that if

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[8]These procedures are reproduced and discussed in detail in *Henglein 2* at 88-92, 97-99, 103-105. [App. at 118-22, 126-29, 132-35.]

an employee had asked a "knowledgeable and authorized management employee of the company" about the Informal Plan, the employee would have been informed that no Informal Plan existed. *Henglein 2* at 34. [App. at 77.]

The district court thus granted Petitioner's Rule 52(c) motion. On appeal, the Third Circuit again vacated and remanded, holding that the district court failed to apply the law properly. *Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees,* No. 93-3219 (3d Cir. Jan. 13, 1994) ("*Henglein II*"). *Henglein II* at 9. [App. at 41.] The Third Circuit did not find any error as to the factual findings of the district court.

In *Henglein II*, the Third Circuit directed the district court to re-examine the Plaintiffs' claims not under state law but under ERISA, which refers to the "surrounding circumstances" to determine whether an employee benefit plan exists at the time benefits are denied. *Henglein II* at 3-4, *citing Donovan v. Dillingham*, 688 F.2d at 1373. [App. at 36-37.] According to the Third Circuit, the district court erred in continuing to apply state law principles to pre-ERISA events. *Henglein II* at 5-6. [App. at 37-38.] The Third Circuit reiterated that participants do not have to have knowledge of the terms of an ERISA plan to be entitled to benefits thereunder. *Henglein II* at 6. [App. at 38-39.]

On remand, the district court again entered judgment in favor of Petitioner based on Rule 52(c), "conclud[ing] that Plaintiffs have failed in their case in chief to meet their burden of proving the existence in 1982 of an employee benefit plan in accord with the provisions of ERISA." *Henglein v. Colt Indus. Operating Corp. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 86-2021 (W.D. Pa. Feb. 10, 1994) ("Henglein 3").[9] [App. at 22.]

In its opinion, the district court applied *Dillingham* and held that the ability of the employer to select with whom it would

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[9]The district court also quoted from its first *Henglein* opinion dismissing Plaintiffs' claims for lack of subject matter jurisdiction. *Henglein 3* at 9-11. [App. at 30-31.]

contract and to whom it would pay benefits among employees-at-will would not allow a reasonable person to identify the intended beneficiary. *Henglein 3* at 2-3. [App. at 25.] The district court found no dispute as to the action of Crucible's Board of Directors in 1972 terminating the Informal Plan. *Henglein 3* at 3. [App. at 25.] The district court concluded that although the rescission may not have been effective under state law (if other elements of estoppel were proved), the rescission nevertheless unambiguously evidenced the sponsor's intent not to maintain the alleged Informal Plan after the effective date of ERISA.[10] *Id.*

The district court found that during the ten year hiatus from the time of the rescission until the filing of the lawsuit claiming benefits (which "straddled" the passage of ERISA), there was no evidence that the employer in any way ever referred to the Informal Plan, ever awarded benefits under the Informal Plan, ever funded the Informal Plan, or ever misled anyone as to the existence of the Informal Plan. *Henglein 3* at 7- 9. [App. at 28-30.] Plaintiffs appealed the district court's judgment.

Appellate Decision

For a third time, the Third Circuit vacated and remanded. *Henglein v. Colt Industries Operating Corporation Informal Plan for Plant Shutdown Benefits for Salaried Employees*, No. 94-3074 (3d Cir. Sept. 26, 1994), *reh'g denied,* (November 4, 1994) ("*Henglein III*"). *Henglein III* at 3. [App. at 6.] In referring to the 1968 and 1969 documents, the Third Circuit held that even if total and absolute discretion existed in the employer, the 1968 and 1969 policy documents under *Dillingham* would constitute an employee benefit plan. *Henglein III* at 7. [App. at 9.] The Third Circuit reasoned - that the district court's analysis was unduly narrow because it only considered events after 1975, whereas the Dillingham analysis must include all events. *Henglein III* at 9-10. [App. at 10-11.] *See* discussion of *Dillingham infra at* 20-24.

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[10]The district court noted that the fact that the alleged Informal Plan would violate every pension requirement of Title I, Parts 2, 3 and 4 of ERISA, was evidence that the employer did not intend to maintain the alleged Informal Plan. *Henglein 3* at 9. [App. at 30.]

The Third Circuit's mandate in *Henglein III* directs the district court to apply ERISA's definition of an "employee benefit plan" to documents that were operative in 1962 through 1972 and indisputably rescinded by the employer in 1972, before ERISA became effective. *Henglein III* at 19. [App. at 18.] The Third Circuit's analysis requires that once a claim for benefits is made after ERISA's effective date, the federal courts have jurisdiction to apply and interpret all events under the law of ERISA, even if the underlying events occurred before ERISA's effective date and the effect of such an interpretation is to impermissibly expand the court's subject matter jurisdiction over the claim.

REASONS FOR GRANTING THE WRIT

The Third Circuit's opinion contravenes two of the most fundamental tenets of ERISA. The first tenet is that ERISA does not require any employer to establish or maintain an employee benefit plan. Rather, ERISA only regulates employee benefit plans *once they are* established or maintained by an employer on or after ERISA's effective date. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). *See* ERISA §§ 3(1) and (2); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980). As a corollary to this tenet, this Court in *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1350 (1992), indicated that principles of "reliance" cannot be used to establish rights to benefits under ERISA, because "[a]ny such approach would severely compromise the capacity of companies like Nationwide to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be."

The second fundamental tenet of ERISA is twofold: (1) ERISA broadly preempts state laws (ERISA § 514(a)); and (2) ERISA's standards (including preemption) may not be applied retroactively. ERISA § 514(b) ("[section 514] shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975").[11]

[11] Although this Court has addressed ERISA preemption on numerous occasions, this Court has never held that ERISA preemption applies retroactively. Indeed, this Court has held that as a general rule, federal statutes and case law arising thereunder are not to be applied retroactively. *Florida v. Long*, 487 U.S. 223 (1988)(construing Title VII of the Civil Rights Act).

The facts of this case and the Third Circuit's mandate with respect thereto illustrate the very concerns addressed in *Alessi*, *Darden* and ERISA § 514(b). The employer instituted an informal policy and procedure 12 years prior to the passage of ERISA whereby the employer might agree to enter into individual contracts with selected employees to provide supplemental pension-type benefits. In 1972, the employer's Board of Directors duly rescinded the informal policy by resolution. Thereafter, the employer made no public reference to the former policy. In 1982, ten years after the policy was eliminated, former employees sued for benefits that would have been paid under the terminated policy only if the employees had been selected and approved by the employer for those benefits.

The Third Circuit has directed the district court to apply the *Dillingham* test, as interpreted by the Third Circuit, to events occurring *before* ERISA became effective. This direction is nothing less than a mandate to do what ERISA § 514(b) expressly prohibits: apply ERISA's provisions and the law developed thereunder to events that occurred and were concluded before ERISA became effective. Moreover, the Third Circuit has espoused Plaintiffs' view and has directed the district court to conduct a reliance-focused inquiry into the "expectations" of Plaintiffs in applying the "surrounding circumstances" test of *Dillingham* to determine whether the informal policy existed as an ERISA "plan" in 1982.

Thus, under the Third Circuit's approach, the federal courts have the power under ERISA to reestablish and redefine as an ERISA "plan" any pre-ERISA discretionary employee benefit policy based solely upon principles of reliance, notwithstanding that such policy may have been validly terminated as a matter of state law before ERISA became effective. This approach would impose upon unwilling employers the burdens and obligations of maintaining an ERISA plan, in clear contravention of the principles expressed by this Court in *Alessi* and *Darden*, and creates potential corporate liabilities that are incapable of current calculation.

More important, since the existence of an ERISA "plan" is essential to federal court jurisdiction to adjudicate claims for ERISA

plan benefits, the Third Circuit's approach effectively holds that the federal courts have the power to create their own subject matter jurisdiction under ERISA. This approach blatantly violates the principles set forth in ERISA § 514(b) as well as Article III of the Constitution. The federal courts simply do not have the power to "bootstrap" their own jurisdiction by creating ERISA "plans" based on principles of reliance where the employer indisputably did not intend to establish or maintain an ERISA plan.

In light of the magnitude of the Third Circuit's errors and the jurisdictional consequences of its mandate, this Court should grant the writ of *certiorari* for this action cannot be permitted to proceed.

I. THE THIRD CIRCUIT COURT OF APPEAL'S MANDATE THAT THE DISTRICT COURT APPLY COMMON LAW STANDARDS TO BE ADOPTED BY THE COURTS AS FEDERAL COMMON LAW DEVELOPED UNDER ERISA TO CONDUCT AND EVENTS THAT OCCURRED BEFORE THE ENACTMENT OF ERISA IS IN DIRECT CONFLICT WITH THE UNITED STATES CONSTITUTION, ITS OWN DECISIONS, THAT OF OTHER CIRCUITS AND THE MANDATE OF CONGRESS EVIDENCED BY THE UNAMBIGUOUS LANGUAGE OF ERISA

A. THE THIRD CIRCUIT HAS ERRONEOUSLY CONCLUDED THAT JURISDICTION OF THE SUBJECT MATTER PROPERLY LIES IN A FEDERAL COURT BY PLEADING A CAUSE OF ACTION UNDER ERISA AND THAT THE DETERMINATION OF THE EXISTENCE OF A PLAN INVOLVES A FINDING ON THE MERITS OF PLAINTIFFS' CLAIM

A judgment rendered without subject matter jurisdiction is a nullity and violates Article 3, Section 2, Clause 1 of the United States Constitution. *See e.g., Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982). Jurisdiction is found only through a specific grant of the Constitution or through an act of Congress authorized under the Constitution. It is axiomatic that "the jurisdiction of the federal courts is limited and should be narrowly con-

strued." Friedenthal, Kane & Miller, *Civil Procedure* § 2.2 at 13 (2d ed. 1993). The Third Circuit is mandating the district court to render such a judgment because, in its view, the conclusion that a plan exists is "related to the viability of the claim, but not to the district court's jurisdiction. Thus, although the district court labeled its judgment as a dismissal entered for lack of subject matter jurisdiction, the judgment was clearly on the merits . . ." *Henglein I*, 974 F.2d at 398. [App. at 492.] The Third Circuit appears not to acknowledge that a judgment that the basis for subject matter jurisdiction does not exist can also involve a determination on the merits of the claim.

The Third Circuit may be confusing a court's jurisdiction to determine whether or not subject matter jurisdiction exists with a proceeding to adjudicate a case on the basis of the merits of a plaintiff's claim. The proof required to determine subject matter jurisdiction may be applicable to both determinations, but the determinations must be made independently and strictly in order.

The Third Circuit relied on its reasoning with respect to federal jurisdiction in its holding in *Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49 (3d Cir. 1985). *Henglein I*, 974 F.2d at 398. [App. at 493.] The court in *Jameson* held that a federal court has subject matter jurisdiction if a claim for benefits was denied after January 1, 1975. 765 F.2d at 51. *Jameson*, however, did not stand for the proposition that an alleged post-1974 denial of benefits was the only element necessary to sustain subject matter jurisdiction.

The *Henglein I* panel appears to have been confused by the *Jameson* panel labelling the "act or omission exception" as a choice of law provision, *Jameson*, 765 F.2d at 51, and the cause of action exception as "jurisdictional," *id.* Those labels work as long as other essential elements of jurisdiction are indisputably present (*i.e.*, participants and a plan). When another essential jurisdictional element is missing (which was not the case in *Jameson*), the acts or omissions limitation becomes a "jurisdictional" clause unrelated to a later determination of the claim and the court must make an independent inquiry into the existence of the jurisdictional element if jurisdiction is disputed in the responsive pleadings. This Court long has recognized that "'if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by compe-

tent proof.'" *Janzen v. Goos*, 302 F.2d 421, 424 (8th Cir. 1962) (Blackmun, J.) *quoting Thompson v. Gaskill*, 315 U.S. 442, 446 (1942) *and citing McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936). Speaking for this Court Justice Douglas wrote, "[w]e only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." *Land v. Dollar*, 330 U.S. 731, 739 (1947). Judgment rendered on such a basis is nevertheless a judgment that subject matter jurisdiction does or does not exist in fact and carries with it the attendant constitutional and statutory consequences of impermissibly expanding or contracting the scope of a federal court's jurisdiction.

The Third Circuit would avoid further inquiry into the propriety of subject matter jurisdiction by holding that an entity essential to *both* subject matter jurisdiction and the substantive merits of a plaintiff's claim does not deprive the court of jurisdiction simply because the entity does not exist. The plaintiff need only plead that the entity exists in his complaint. Now the law in the Third Circuit is that "[w]e disagree with any statement . . . that the absence of a plan deprives the court of subject matter jurisdiction," *Henglein I*, 974 F.2d at 398, [App. at 493], to hear a claim under ERISA § 502(a)(1)(B) for benefits under a "plan."[12] The Third Circuit appears to hold that the absence of an essential element to a plaintiff's claim goes to the viability of his claim, but not jurisdiction.[13] *Id.* at 398. [App. at 492.] As explained, it can be both.

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[12] Should there be any doubt that this is the law of the Third Circuit, *see Boyle v. Governor's Veterans Outreach & Assistance Ctr.*, 925 F.2d 71 (3d Cir. 1991). There, the Third Circuit held "that the [42 U.S.C. § 1983] requirement of state action was *not* jurisdictional, but rather integral to the merits of the claim." 974 F.2d at 397, *citing Boyle*, 925 F.2d at 74. [App. at 492.]

[13] *Contra, Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553 (9th Cir. 1987) ("employer" goes to both viability of Jones Act claim and subject matter jurisdiction); *Wheeler v. Hurdman*, 825 F.2d 257, 258 (10th Cir.) *cert. denied*, 484 U.S. 986 (1987) ("employer" for purposes Title VII); *Harris v. Arkansas Book Company*, 794 F.2d 358, 360 (8th Cir. 1986) ("the existence of a plan is a prerequisite to jurisdiction under ERISA"); *Clark v. Tarrant County*, 798 F.2d 736, 742 (5th Cir. 1986) (determination of "employer" for purposes of subject matter jurisdiction Title VII); *Odom v. Slavik*, 703 F.2d 212, 216 (6th Cir. 1983) (existence of a "security is determinative of both the jurisdictional issue and the merits of the claim).

Here, after eleven days of trial, plaintiffs failed in their burden to prove the existence of a plan for purposes of establishing the ERISA § 502(e) jurisdiction of the court.[14] Such a finding, although on the merits of the evidence presented, is nevertheless a finding that subject matter jurisdiction does not exist. To say that the finding has nothing to do with subject matter jurisdiction because it was based on the merits impermissibly expands the scope of subject matter jurisdiction in violation of the United States Constitution and ERISA.

B. THE ERRONEOUS RETROACTIVE APPLICATION OF *DILLINGHAM* BY THE THIRD CIRCUIT CREATES SUBJECT MATTER JURISDICTION WHEN SUCH JURISDICTION WOULD NOT OTHERWISE EXIST

Because the existence of a plan as defined under ERISA § 3(3) is absolutely essential to a finding that the district court has subject matter jurisdiction to adjudicate plaintiffs' claims under ERISA (which Petitioner has vigorously denied in all pleadings), the failure to properly apply *Dillingham* only to events and acts occurring after 1974 creates subject matter jurisdiction where none would otherwise exist.

Dillingham is a case applying the requirements of ERISA § 3(1) to determine the existence of an "employee welfare benefit plan" by conducting an analysis of "surrounding circumstances" to determine if a reasonable person could ascertain intended benefits, intended beneficiaries, a funding source and claims procedures to determine the existence of a plan.[15] 688 F.2d at 1372. In *Dillingham*, the Eleventh Circuit examined certain facts and circumstances (all of which applied to entities that admittedly were in existence after the effective date of ERISA) to determine that employee welfare benefit plans existed. Based on an analysis of

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[14] This was admitted by the Third Circuit in *Henglein III*. "Our problem is that the record before us is insufficient for us to apply the *Dillingham* criteria." *Henglein III* at 22. [App. at 20.]

[15] *Dillingham* was an appeal from a district court finding that the court had no subject matter jurisdiction because no plan existed. 688 F.2d at 1370.

facts and events occurring after the effective of ERISA, the court determined that ERISA "plans" existed, it thus determined that subject matter jurisdiction existed. *Id.* at 1370. A finding of no plan would result in dismissal for lack of subject matter jurisdiction.[16] To apply *Dillingham* to any communications, notices, board resolutions or verbal comments made before 1975 violates ERISA's mandate not to apply ERISA to acts or omissions that occurred prior to January 1, 1975. Nevertheless, the Third Circuit noted that in this case "those surrounding circumstances include the company's history of representations -- a history that straddles the enactment of ERISA."[17] *Henglein I*, 974 F.2d at 399. [App. at 494.]

In fact, the Third Circuit instructions to the district court on how to apply *Dillingham* after 1974 are incorrect. *Dillingham* specified an objective approach to ascertaining intended benefits and beneficiaries. 688 F.2d at 1370. The Third Circuit has instructed the district court to consider such post-1974 reliance-oriented factors as "whether the plan was properly published," *Henglein III* at 11, [App. at 12,] "reasonable beliefs of the employees," *id.* at 12, [App. at 12,] "employees. . .relied on [the plan's] continuance until. . .1982," *id.* at *14*, [App. at 14,] "the employees may have reasonably believed the plan to be in effect," *id.* at *19*. [App. at 18.] Such an approach does not square with the *Dillingham* inquiry as to whether a reasonable person could *ascertain* intended benefits (*i.e.*, not simply "believe" them into being). Reliance-oriented approaches to determining pension benefits are inappropriate.

In the situation of whether "lack of notice" of events before ERISA should apply to allow a court to exercise jurisdiction after the effective date of ERISA, the Sixth Circuit feared that such an approach would "obscure, at least to some degree, a clear reading of [§ 514 of ERISA] by introducing a judicial gloss implicating notice,

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[16] *E.g., see generally Taggart Corp. v. Life & Health Benefits Admin.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981)

[17] The record shows that the *only* representation made by any Colt salaried employee after 1975 may have been vague statements to those who were formerly in the bargaining unit that their benefits would be "equal to or better than" union benefits. *Henglein 2* at 65-74. [App. at 99-108.]

reliance, and other equitable considerations. Such considerations have no place in the determination of whether a federal court has the subject matter jurisdiction to consider a claim under ERISA." *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 454 (6th Cir. 1992). The use of reliance in the pension benefit area also was recently criticized by Justice Souter of this Court:

> Moreover, any enquiry into 'reliance,' whatever it might entail, could apparently lead to different results for claimants holding identical jobs and enrolled in identical plans. . . .
>
> Any such approach would severely compromise the capacity of companies. . .to figure out what their pension-fund obligations will be.

Nationwide, 112 S. Ct. at 1350.

The *Henglein I* approach that the denial of a benefit after 1975 alone gives rise to federal jurisdiction presupposes that the denial of a claim after 1975 is the only essential element to a jurisdictional finding, and that other jurisdictional elements, the existence of which are very tenuous under a proper application of *Dillingham*, may be established under a clearly erroneous application of federal law developed after the effective date of ERISA in order to confirm its previously assumed jurisdiction (*i.e.,* the existence of a plan under *Dillingham*).

In fact, in five of the circuit courts of appeal, even when the essential element of the existence of a plan is admitted, the concentration of all or most probative facts relevant to a determination of an ERISA claim to a time antedating ERISA is enough to deny subject matter jurisdiction. *See Stevens*, 979 F.2d 444; *Lamontagne v. Pension Plan of the United Wire, Metal & Machine Pension Fund*, 869 F.2d 153 (2nd Cir.), *cert. denied*, 493 U.S. 818 (1989); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Quinn v. Country Club Soda Co., Inc*, 639 F.2d 838 (1st Cir. 1981).

The opposite view in this ongoing debate (and in which this Court has thus far declined to intervene) is that the post-ERISA denial of a benefit is both the "act or omission" that is subject to ERISA and the event by which the court marks the accrual of the cause of action. *See, Rodriguez v. MEBA Pension Trust*, 872 F.2d 69 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989); *Tanzillo v. Local Union 617, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 769 F.2d 140 (3d Cir. 1985); *Jameson*, 765 F.2d 49; *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980). Of these cases taking an expansive view of ERISA preemption, it is important to note that the existence of subject matter of jurisdiction (plans) was not at issue (as it is in the instant case) and the only relevant jurisdictional inquiry was with respect to when the act or omission occurred that defined the terms of the plan.[18]

One line of cases says that the cause of action exception of ERISA § 514(b)(1) informs a court as to the existence of jurisdiction and the act or omission exception may or may not call for the application of pre-ERISA law (the "choice of law" provision in *Jameson* terminology). The other line of cases says that both exceptions have relevance to a determination of jurisdiction (the scope of jurisdiction under § 502 is "coterminous" with preemption under § 514, *Stevens*, 979 F.2d at 450). Both lines are applying the two § 514 limitations on ERISA's statutory grant of jurisdiction under § 502(e).

Regardless of whether *either* a cause of action or an act or omission prior to the effective date of ERISA removes subject matter jurisdiction from the federal courts, petitioners believe that the act or omission exception of § 514 applies to proof of the existence of the elements necessary to support subject matter jurisdiction under § 502 and that the reasoning of the "narrow view of preemp-

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[18]In the case of *Jameson* it would be more accurate to say that particular panel of the Third Circuit would have applied state law to pre-ERISA acts because the other Third Circuit cases reach a different result. *See Tanzillo*, 769 F.2d 140 and *see generally* the entire *Henglein* line of opinions before this Court.

tion" cases is apposite. The Court of Appeals for the Sixth Circuit aptly compared the two sections. *Stevens*, 979 F.2d at 449-50. That court observed that § 502 "gives plan participants the right to bring suit against plans and establishes federal court jurisdiction over ERISA actions; however, it does not speak to the scope of ERISA jurisdiction." *Id.* at 450. The court goes on:

> We find guidance in another section of the statute, however, concerning the scope of ERISA jurisdiction: the section addressing ERISA preemption. This provision mandates that with two notable exceptions, ERISA, and not state law, governs actions brought by plan participants . . . .
>
> . . . .
>
> Although the statute does not say so explicitly, we conclude logically, we think, that the language of [§ 514], establishing the scope of ERISA preemption, also establishes the scope of ERISA jurisdiction.

Id.

C. TO ESTABLISH SUBJECT MATTER JURISDICTION UNDER SECTION 502(e) OF ERISA THE THIRD CIRCUIT HAS APPLIED POST-ERISA LAW SELECTIVELY TO PRE-ERISA ACTS OR OMISSIONS THROUGH ITS ERRONEOUS CONSTRUCTION OF ERISA SECTION 514(b) AND ITS APPLICATION OF THAT SECTION TO THE EXISTENCE OF A PLAN UNDER ERISA SECTION 502(a)(1)(B) IN DIRECT CONFLICT WITH THE CLEAR LANGUAGE OF THE STATUTE AND WITH ITS OWN PREVIOUS DECISION AND DECISIONS OF OTHER CIRCUITS

The Third Circuit has announced, in one published opinion and two unpublished opinions, that the retroactive application of Title I of ERISA to the conduct of employers is not only permissible, but mandated. *Henglein I*, 974 F.2d at 398; *Henglein II* at 5; *Henglein III* at 6. [App. at 494, 37, 8.] This is in clear and direct violation of ERISA § 514 and the law established by this Court.[19]

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[19] *See, e.g., United States v. Security Indus. Bank*, 459 U.S. 70 (1982); *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190 (1913).

No employer, or any other fiduciary for that matter, in existence prior to the effective date of ERISA can be assured that conduct occurring twenty years ago will not become legally significant and generate enormous liability.

ERISA Section 514(a) specifically prohibits this mandated retroactive application for it provides, in relevant part, that Title I of ERISA supersedes all state laws to the extent they relate to a benefit plan after the effective date of ERISA (generally January 1, 1975). Section 514(b), however, applies two important unambiguous limitations to generally mandated preemption: Title I of ERISA will not supersede any state law (i) with respect to any cause of action which arose before January 1, 1975, or (ii) with respect to any act or omission which occurred before January 1, 1975. If the cause of action arose before 1975, ERISA does not apply. If the act or omission occurred before 1975, the provisions of ERISA may not apply to any judicial inquiry with respect to those acts or omissions and their legal significance and effect.

ERISA § 502(a)(1)(B) gives a participant or beneficiary the right to bring a claim to recover benefits due under the terms of a plan. If there is no plan there can be no participant as defined in ERISA Section 3, and a plaintiff is entitled to no relief.

In *Henglein I*, the Third Circuit has badly misconstrued ERISA § 514 and its relationship to ERISA § 502. The court has construed § 514 to provide once an allegation of a claim is made after 1975, that subject matter jurisdiction attaches to a claim because it is a cause of action that arose after 1975, and a district court should apply ERISA with respect to all acts or omissions relating to that claim, regardless of whether they occurred before 1975. *See generally*, 974 F.2d at 397-99. [App. at 491-95.] The only way state law would apply, according to the Third Circuit, is if the plaintiffs brought a state law count over which the district court would have either supplemental jurisdiction or federal question jurisdiction "if the contract could be construed as an employee benefit plan." *Id.* at 398. [App. at 493-94.] The court also said "if . . . benefits were denied not in 1974, but in 1976, a district court

would have jurisdiction to hear both a contract claim . . . and an ERISA claim . . . . The court would apply state contract law to the contract claim and federal law to the ERISA claim."[20] *Id.* at 399. [App. at 495.] The error in this line of reasoning is that a pendant state contract claim under holdings of this Court "relate to" an employee benefit plan and are preempted by ERISA. *See e.g., District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

The Third Circuit attempted to justify its holding with a flawed and difficult to follow syllogistic-like line of reasoning. 974 F.2d at 399. [App. at 494-95.] The court differentiated between "enforceability" of a plan (with respect to which the application of post-ERISA law prior to 1975 clearly would be impermissable) and the "existence" of a plan. The premise for such a finding, as described in the first paragraph of Section V, *id.*, is the following sophistry: ERISA applied prospectively to plans in existence at the time of its enactment; thus, the pre-ERISA enforceability of a plan under state law is not a pre-requisite to a finding that an employee benefit plan exists after the passage of ERISA. As will be discussed further herein, the error here is that prior to the passage of ERISA the rights of employees to employer furnished fringe benefits (including pensions) were totally dependent upon state contract law principles.[21]

A "plan," if it ever existed before 1975, had to exist as an enforceable group offer which ripened into an enforceable contract upon the individual employees' performance of the stipulated preconditions (*e.g.*, working a specified number of years or until a certain age). If there was no enforceable offer (usually forming the

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[20] This statement is in direct conflict with *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1992).

[21] A small number of states immediately before ERISA maintained specific pension statutes later preempted by ERISA.

offer as a basis for a unilateral contract) there was no plan. *See Frenn* at *8-12.* [App. at 522-525.] If, on the other hand, the "offer" or promise was nothing more than an illusion, then nothing existed, let alone anything that was enforceable.[22] The subsequent expression of the employer's intent through a withdrawal of the "illusory offer" pursuant to a validly enacted board resolution that prohibited any offer or contract from coming into being removed any doubt that a "participant" could enforce any right because absolutely nothing whatsoever existed which could provide the basis for the enforcement of any rights. Enforceability, at some time, of an offer under state law was everything.

Because of the Third Circuit's interpretation of ERISA preemption, the Court is mandating that a district court apply a test developed under ERISA Title I in clear violation of a plain reading of a limitation on preemption: "[T]he provisions of [Title I] . . .shall not apply with respect to any . . . act or omission that occurred before 1975." To determine whether there was a basis for concluding the existence of a plan (or more importantly, in this case, the elimination of a plan) before 1975, the law as in effect at the date of the act or omission must be applied to that act or omission. In this case the relevant inquiry was (i) whether Crucible ever maintained a class offer prior to 1972 that could be accepted by certain employees of Crucible under Pennsylvania law and (ii) whether certain salaried employees of Crucible had any rights under Pennsylvania law that would effectively prevent Crucible from rescinding the 1969 and all predecessor arrangement (*e.g.*, perhaps some sort of promissory estoppel argument).

The district court consistently engaged in precisely the foregoing exercise. *Frenn* at *8-12*; *Henglein 2* at 45-53; *Henglein*

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[22] *E.g.*, an offer to pay X for each year employed to any employee retiring after age 60 was an offer in a potential unilateral contract; a policy that said that Crucible would consider a supplementary pension to employees nominated by management and approved at a higher level was, in contract terms, a mere illusion. "If what appears to be a promise is an illusion, there is no promise like the mirage of the desert with its vision of flowing water which yet lets the traveller die of thirst, there is nothing there." *Corbin on Contracts* § 145, at 627 (1963). *See also Williston on Contracts* § 1:2, at 10-11 (1959); Restatement (Second) of Contracts § 2 (1982).

3 at *3-5*. [App. at 522-25, 85-91, 25-27.] The Third Circuit, on the other hand, interpreted the district court's actions to "appear [ ] to have dismissed the employees' ERISA claims as if they were supplemental state law claims." 974 F.2d at 398. [App. at 493.] To the contrary, the district court dismissed the plaintiff's claims because it had made a determination of fact and law that no plan of any sort existed. *Henglein 1* at *6, Henglein 2* at 42. [App. at 509, 42.] Later, under the Third Circuit's direction, *Henglein II* at 5, [App. at 8], the district court examined acts or omissions occurring after 1974 to determine whether or not a plan existed, the existence of which is a requisite element under ERISA § 502(a)(1)(B). *Henglein 3* at 5-9. [App. at 26-30.]

The district court correctly conducted this exercise by an application of the standards of *Dillingham*. Now, once again on remand, the Third Circuit has directed the district court to apply *Dillingham* to pre-ERISA events in addition to post-ERISA events. *Henglein III* at 10. [App. at 11.]

To test the legal effect of Crucible's act taken in 1972 against law that first came into effect two years later is simply not fair (in addition to being an improper expansion of the jurisdiction and power of the federal courts). Fairness is the underlying policy of § 514. As the First Circuit put it:

> Section [514], however, renders ERISA inapplicable not only with respect to "causes of action" arising prior to January 1, 1975, but also with respect to "any act or omission" which occurred before that date. The phrase "act or omission" has been said to "refer [ ] to those significant facts which give rise to a claim but which fall short of establishing a cause of action" [citations omitted] and seems to have been inserted "to permit courts to *apply* state law, even if the cause of action accrued after January 1, 1975, in cases where that result most fairly accommodates the interest of all affected parties -- the beneficiaries, the participants, and fiduciaries of and contributors to an ERISA trust" [citation omitted]. The clear practical import of the act or omission clause is to *prevent past conduct of pension plan fiduciaries and contributors from being*

> *judged retroactively under the standards established by ERISA* simply because the conduct generates consequences subsequent to the ERISA effective date that give rise to what is, technically, an independent "cause of action."

Quinn, 639 F.2d at 841 (1st Cir. 1981) (emphasis added).

Petitioner does not contest that if the *Dillingham* surrounding "facts and circumstances" were construed to include the original 1962 policy, and the 1968 and 1969 modifications, that a plan within the meaning of ERISA would exist in 1982. But if a court must consider *all* surrounding circumstances, the acts of Crucible in terminating the program in 1972 would have been fully effective under ERISA. In 1982, ERISA contained no notice of termination requirement that would have nullified operation of the termination. Thus, if ERISA is to be applied retroactively, the Third Circuit cannot do it selectively.

CONCLUSION

For all the reasons stated above, this petition for writ of *certiorari* should be granted.

Respectfully submitted,

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